Supreme Court
FILED

In The 031476 APR 21 2004

SUPREME COURT OF THE UNITED STATES

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CHARLES E. MCGREGOR,

Petitioner,

versus

NORMAN Y. MINETA, Secretary,
U.S. Department of Transportation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Judicial Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SAME SUPERVISOR DOCTRINE IS A LEGAL LOOPHOLE THAT UNDERMINES THE TITLE VII AND THE OTHER FEDERAL DISCRIMINATION STATUTES.

2. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A COURT MAY APPLY AN UNANNOUNCED CRITERION WHEN THERE IS NO RECORD EVIDENCE THAT THE EMPLOYER EVER APPLIED SAID CRITERIA IN PREVIOUS SELECTIONS.

LIST OF PARTIES

As far as Petitioner is able to ascertain, the names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Since the federal government is the respondent, there are no parent or subsidiary companies of any party to be listed.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

CHARLES E. MCGREGOR,

Petitioner,

versus

NORMAN Y. MINETA, Secretary
U.S. Department of Transportation,

Respondent.

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Charles E. McGregor respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of Georgia entered summary judgment against Petitioner on June 11, 2003. Petitioner filed his timely notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on July 11, 2003. On January 22, 2004, the Eleventh Circuit, pursuant to Eleventh Circuit Rule 36-1,

summarily affirmed the judgment of the District Court. Accordingly, Petitioner files this instant Petition for Writ of *Certiorari*.

JURISDICTION OF THIS COURT

The original jurisdiction of the District Court was conferred pursuant to 42 U.S.C. §§2000e-5(f) and 2000e-14 (c), and 28 U.S.C. § 1331. The Eleventh Circuit entered judgment on January 22, 2004.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.* (Title VII) and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et. seq.* (ADEA). The pertinent provisions of both statutes are set forth below:

Title VII

§ 2000e-16 (a) – Nondiscrimination in Federal Government Employment Discrimination prohibited

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees

and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institute, and in the Government Printing Office, the General Accounting Office and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

ADEA

§ 633a. Nondiscrimination on account of age in Federal Government

(a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those

> units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office and the Library of Congress shall be made free from any discrimination based on age.

STATEMENT OF THE CASE

This is a Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Judicial Circuit. Petitioner, Charles McGregor, an African-American, who is over the age of 40, filed a lawsuit pursuant to Title VII and the ADEA against his employer, the Federal Aviation Administration, hereinafter, "FAA" for two non-selections.

On September 9, 2000, the FAA posted two vacancies for Traffic Management Coordinators, hereinafter TMC, in its Southern Air Traffic Division ARTCC Atlanta. There were two permanent positions and originally four rotational (temporary) TMC positions. Petitioner not only met and exceeded the minimum qualifications for the positions but he received one of the highest scores during the ranking process.

All of the foregoing positions were filled by less-qualified, white, younger males. The FAA's Civil Rights Office refused to concur with the selections because the FAA

gave no justification for not selecting Petitioner and a white female applicant who also filed Equal Employment Opportunity, hereinafter EEO, complaint.

Both the white female and Petitioner had received higher scores than any of the white, younger males who were selected for the rotational positions. For the permanent position, Petitioner received a much higher score than one of the white selectees.

Petitioner filed a timely EEO complaint with the agency's Office of Civil Rights. After 180 days passed and the agency did not issue a final decision, notwithstanding the completion of its internal investigation, Petitioner filed suit in the United States District Court for the Northern District of Georgia.

This case was assigned to a magistrate judge under one of the Internal Operating Procedures of the Northern District of Georgia. Respondent moved for summary judgment basically setting forth their articulated reasons: that since Petitioner had previously[1] served in a rotational TMC position, he was not selected for any of the now five rotational positions and that no had no supervisory

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[1] Petitioner successfully bided on a rotational TMC position, in or around 1991. He served in this position for one year.

recommendations; and for the permanent position, the FAA alleged that Petitioner was not selected because he was not then currently serving in a rotational position at the time of the selections, again, he had no supervisory recommendations, and that he was not the best qualified.

Petitioner filed a response to the summary judgment motion basically demonstrating that there was a sufficient dispute of a material fact – that he was told by two of the cadre of supervisors that each recommended Petitioner for the positions at issue (sworn declaration of Petitioner).

To demonstrate pretext with the rotational position, he included sworn declarations[2] that two white younger employees served twice in rotational positions (additionally, Petitioner attached the bid application for one of the white employees thus indicating that he did indeed serve two times as a rotational TMC).

Furthermore, Petitioner introduced the deposition testimony of the FAA's EEO Manager which clearly and unequivocally demonstrated that the Office of Civil Rights

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[2] Petitioner attempted to obtain information concerning prior selections for the TMC positions but he was told by Respondent Agency that because of its document retention policy it had no such documents and/or information (selection files were destroyed within one year unless there was a challenge to the selection).

did not concur in the selections because the TMC positions should have been filled by the composite scoring methodology (the highest scoring applicant must be selected or the agency must give a justification why the applicant was not selected). In the rotational position, Petitioner received the highest score and the white female received the second highest score.

For the permanent position, Petitioner demonstrated pretext by showing that the FAA used different, inconsistent, unannounced reasons for rejecting both minorities in the selection (Petitioner and the white female).

The magistrate judge rejected Petitioner's arguments. The magistrate judge found that since the white comparators had been selected by different supervisors that they were not similarly situated; the magistrate judge further held that the testimony of the FAA's EEO Manager, who was required to sign off on the selections at issue, was inadmissible hearsay; and Petitioner conclusively did not have any supervisory recommendations because Respondent's agents said so notwithstanding Petitioner's evidence to the contrary.

Petitioner filed timely legally supported objections to the magistrate judge's report and recommendation. Thereupon, the district judge, using some additional

grounds[3], but basically agreeing with the grounds found in the magistrate judge's report, overruled Petitioner's objections and entered judgment against Petitioner.

Petitioner timely appealed to the U.S. Court of Appeals for the Eleventh Judicial Circuit. The Eleventh Circuit held initially that it found no error in the district court's determination that Petitioner failed to rebut the FAA's articulated reason that a preference was given to those employees currently serving in rotational positions for the permanent position.

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[3] One such ground, included the district court's determination that Petitioner's history of awards and positive performance reviews were irrelevant because "much could have occurred between the posting of the positive comments in [Petitioner's] personnel file and the meeting of the supervisors conducted in the fall of 2000". Petitioner was concerned by such a determination since during summary judgment all inferences should be drawn in his favor and not against him (*See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 106 S. Ct. 2509, 91 L.Ed.2d 202 (1986)). There was absolutely no evidence or even a hint of any evidence that Petitioner had performance difficulties since the posting of the positive comments and awards. Moreover, the record clearly showed that none of the cadre of supervisors had any knowledge of Petitioner's work habits and/or performance since he left the TMU position in ***1991***.

After Petitioner requested that the Eleventh Circuit make a determination on the rotational position as well, the Eleventh Circuit then issued a summary, corrected opinion holding that the panel found no merit in Petitioner's claims regarding the rotational positions.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve a split not only within the Eleventh Circuit but a split within the Federal Court of Appeals on an important Title VII issue – the application of the same supervisor doctrine as a matter of law to defeat the employee's *prima facie* case. This doctrine continues to provide a safe harbor for those employers so inclined to violate the Federal discrimination statutes.

Without a "definitive rule" or at least more specific guidance, the lower courts have applied this Title VII offensive doctrine in a myriad of different determinations – all of which have eviscerated the Title VII, and seeks to undermine the United States Congress.

Additionally, this Court should also grant the writ to re-direct the U.S. Court of Appeals for the Eleventh Circuit, which has sanctioned a departure by its lower court of this Court's holdings in landmark cases, *McDonnell-Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 567 (1973); *McDonald v. Santa Fe Trail Transportation Co,* 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976). The application

of the same supervisor doctrine redefines the legal definition of "similarly situated" as set forth in the foregoing binding precedents.

It adds a heightened evidentiary step and renders it almost impossible for the employees to survive summary judgment motions unless they utilize comparators from the same selections at issue. Such a narrowing of comparators defeats not only the purpose of this Court's decision in *McDonnell-Douglas, id* but it also creates a legal loophole in the Federal discrimination statues thus, greatly undermining the intent of the United States Congress.

The Eleventh Circuit's concurrence with such straying by its District Court from long standing landmark decisions precludes the victims of discrimination from pursuing the relief that this Court held should be liberally applied to victims of workplace discrimination (*See Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-19, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975)). This result cannot stand.

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SAME SUPERVISOR DOCTRINE IS A LEGAL LOOPHOLE THAT UNDERMINES THE TITLE VII AND THE OTHER FEDERAL DISCRIMINATION STATUTES

The Eleventh Circuit's endorsement of the same supervisor doctrine cannot square with the Supreme Court's definition of "similarly situated" as set forth in landmark cases (*See McDonnell-Douglas, id*; *McDonald v. Santa Fe Trail Transportation Co ,id*).

This court has repeatedly held "similarly situated" does not mean "identical" (*See McDonnell-Douglas, id*). In the case at bar, the Eleventh Circuit has redefined "similarly situated" to include only personnel actions made by the same supervisors, and has thus cut Petitioner "off at the pass" with the same supervisor doctrine as a matter of law.

Indeed the doctrine as used in the Eleventh Circuit case law is ambiguous, and inconsistent, at best. In some cases, the Eleventh Circuit held as a matter of law, that the comparables are not, and cannot be, similarly situated because of different supervisory decisionmakers.

In *Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002) the Eleventh Circuit held that the plaintiff's attempt to use prior performance evaluations from different supervisors

to establish a genuine issue of pretext was unavailing. The court held as follows:

> Different supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important.

On the other hand, the Eleventh Circuit has held that the African-American plaintiff's evidence that middle managers knew of the leniency shown to white comparators by other supervisors will establish pretext even though the foregoing managers were not the decisionmakers (*See Anderson v. WBMG-42*, 253 F.3d 561, 566 (11th Cir. 2001).

But Compare, Jones v. Bessemer, 137 F.3d 1306, 1312 n. 7 (11th Cir. 1998), *modified*, 151 F.3d 1321. The Eleventh Circuit held as follows:

> We also note that Smith's and Nettle's day off violations were several years distant from Plaintiff's acts; and, at the time of the incidents (1988 and 1985 respectively) they were under different supervisors. Such a difference may be sufficient to prevent them being considered "similarly situated" with Plaintiff [citations].

Other Circuits that have dealt with the same supervisor doctrine have been less restrictive than the Eleventh Circuit. The Sixth Circuit held in *Cooper v. City of*

North Olmsted, 795 F.2d 1265, 1271 (6th Cir. 1986) as follows:

> Although a change in manager is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees.

In *Tate v. Weyerhauser Co*, 723 F.2d 598, 605-06 (8th Cir. 1983), the Eighth Circuit addressed the same supervisor doctrine in the same manner as the Sixth Circuit. The Eighth Circuit refused to hold as a matter of law that actions by different supervisors render non protective comparators invalid.

In the case at bar, Petitioner clearly demonstrated that most of the managers comprising the cadre of supervisors were or should have been aware that the two white comparators were selected twice to serve in a TMC rotational position. Simply because they were not the decisionmakers, should not have destroyed Petitioner's comparators[4].

It is clear that the same supervisor doctrine should not be used to grant summary judgment. It presents a factual dispute as to whether a non permissive bias motivated the

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[4] Petitioner sought to point to the existence of evidence that could demonstrate pretext by showing that younger white employees were treated differently than he was (*See McDonnell-Douglas, id*).

personnel action at issue or whether the difference in decisionmakers accounted for the difference in treatment. Accordingly, Petitioner argues that such an issue is best left for a jury to decide.

Moreover, the application of the same supervisor doctrine as a matter of law provides a legal loophole around the Title VII and the other Federal discrimination statutes. All, any discriminating employer need to do to avoid Title VII liability is to rotate supervisors in all its selections. The protected class applicants could never prevail in a legal discrimination challenge because they would have no comparators under the harsh "same supervisor doctrine".

Such legal wangling is not only repugnant and offensive, but such is counterintuitive to the purpose and intent of the Title VII. Given the humanitarian value of Title VII and the fact that Congress wants employers vigorously prosecuted for discrimination in the workplace, such a result must not stand.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A COURT MAY APPLY AN UNANNOUNCED CRITERION WHEN THERE IS NO RECORD EVIDENCE THAT THE EMPLOYER EVER APPLIED SAID CRITERION IN PREVIOUS SELECTIONS.

In the case at bar, the Eleventh Circuit held that since Petitioner failed to show that the proffered reason that he was not granted a permanent position, namely that a preference was given to those employees currently serving in rotational positions was pretextual, that they found no error [Appendix A.2].

First and foremost, this is a summary judgment proceeding, and Petitioner need only point to the existence of some evidence that could cause a jury to find for him; he need not prove pretext during this proceeding (*See Maddow v. Proctor & Gamble,* 107 F.3d 846, 851 (11th Cir. 1997)).

Nevertheless, Petitioner argues that even if he had such a burden during summary judgment proceedings, and he does not, that this issue is a jury question – whether the FAA actually gave preference to employees serving in a rotational position or whether the FAA actually was motivated by non permissive bias.

The Eleventh Circuit and/or its district court's line of reasoning undermines Title VII and the other Federal employment discrimination statutes as well as this court's binding precedent. In the absence of any comparative selections, Petitioner cannot meaningfully rebut[5] Respondent's after-the-fact, unannounced, alleged articulated reason.

Other Circuits that have dealt with this issue found such uniqueness not only convenient but that such presented a legal loophole around the Title VII. The D.C. Circuit found that the District Court's acceptance of the government's

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[5] The Eleventh Circuit and its district court ignored the fact that the FAA presented no evidence to justify its decision to base the permanent selection upon its alleged preference for candidates serving in rotational positions. *But Compare*, *Lathram v. Snow*, 336 F.3d 1085, 1090, n. 6 (D.C. Cir. 2003)(the employee demonstrated pretext when the government failed to introduce any evidence why the challenged position should have been announced at a GS 15 instead of a GS 14, the level for which the plaintiff could have qualified). To allow the employers to create after- the fact, "preferences" and unannounced criteria that the protected class person cannot qualify for, undermines the Title VII. The employer gets to discriminate legally and the employee cannot rebut these after-the-fact, unannounced subjectively applied criteria designed to weed them out.

articulated reason that the African-American plaintiff was not selected for the position because he did not occupy the position like the white successful candidate unpersuasive to the African-American plaintiff's Title VII challenge (*See Cones v. Shalala,* 199 F.3d 512 (D.C. Cir. 2000)). The D.C. Circuit rebuffed this position, and held that such logic undermines *McDonnell-Douglas* and does nothing more than create a legal loophole in the Title VII, *id* at 518. Moreover, the D.C. Circuit further held nothing in either Title VII or *McDonnell-Douglas, id* supports such a counterintuitive result. As the D.C. Circuit further held – ***it is a jury question as to whether the employer actually had a preference for employees occupying the position or whether the employer was motivated by non permissive bias.***

Petitioner argues that the District Courts may not as a matter of law conclude that any unannounced, after-the-fact articulated reason is sufficient to rebut the plaintiff's *prima facie* case when the plaintiff has no reasonable opportunity to rebut such.

The Sixth Circuit rejected the District Court's finding that the plaintiff should suffer summary judgment because he could not show that non-protected class employees were treated differently when due to the uniqueness of the situation, there were no similarly situated employees (*See Ercegovich v. Goodyear Tire & Rubber Co,* 154 F.3d 344 (6th Cir. 1998)).

As the Sixth Circuit held, creating such impossible standards for the plaintiff to rebut would permit a discriminating employer to evade the purview of Title VII, and thus undermine the United States Congress.

The Seventh Circuit, relying upon the opposite approach to the Eleventh Circuit, finds not only that a plaintiff need not rebut an unannounced, after-the-fact, unpublished criteria but rather the plaintiff can demonstrate pretext when he was non-selected based upon criteria not included in the written announcement (*See Courtney v. Biosound, Inc,* 42 F.3d 414, 421 (7th Cir. 1994)).

The Seventh Circuit held as follows:

> The advertisement stated that an ideal candidate must be research-oriented but said nothing about communication skills. Given Biosound's claim that it had placed a "high premium" on finding an individual who could satisfy its "unique communication needs", a reasonable juror could conclude that Biosound would have included this qualification in the job listing had it honestly believed that it was of primary importance for the new position.

The Second Circuit likewise took a position inapposite to the Eleventh Circuit. The Second Circuit held that employer's reason that it did not interview its former manager of internal communications because of her lack of experience

in external communications presents genuine issues of material fact as to pretext, where the job advertisement did not state that the position would include external communication (*See Gallo v. Prudential Residential Services,* 22 F.3d 1219, 1225 (2d Cir. 1994)).

It is clear in the case at bar, that the written job description or any record evidence did not show that the FAA had a preference for employees currently serving in a rotational TMC position ***before*** Petitioner mounted his discrimination challenge. Accordingly, a reasonable jury as the Second and Seventh Circuits have held could well decide that the FAA had no such preference and that articulating this after-the-fact unpublished criteria was to mask its discriminatory deeds.

Furthermore, a reasonable jury could conclude that if this were the deciding factor over all other written criteria, for which Petitioner surpassed the two white selectees, then surely this criterion would and should have been placed in the job announcement like the other measuring criteria.

CONCLUSION

For all the reasons set forth herein, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted this 21st day of April 2004.

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**APPENDIX A – ELEVENTH CIRCUIT OPINION-
DATED JANUARY 22, 2004**

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 03-13554
Non-Argument Calendar

D.C. Docket No. 01-03303-CV-BBM-1

CHARLES E. MCGREGOR,

Plaintiff-Appellant,

versus

NORMAN Y. MINETA, Secretary,
U.S. Department of Transportation,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(January 22, 2004)

Before CARNES, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Charles E. McGregor, an African-American male over the age of 40, appeals the district court's grant of summary judgment to Norman Y. Mineta, the Secretary of the U.S. Department of Transportation (Secretary), in his lawsuit alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

McGregor appeals the district court's findings that he could not prove that the Secretary's proffered non discriminatory reasons for its failure to select him for either the rotational or permanent position were pretextual. However, based on this record, we find no error in the district court's determination that McGregor failed to show that a proffered reason that he was not granted a permanent position, namely, that a preference was given to those employees currently serving in rotational positions, was pretextual. Further, we find no merit to McGregor's claims regarding the rotational positions. Thus, the district court's grant of summary judgment to the Secretary is

AFFIRMED.

APPENDIX B- DISTRICT COURT'S ORDER – ENTERED ON JUNE 11, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHARLES McGREGOR,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
v.	)	NO.1:01-CV-3303-BBM
	)	
NORMAN Y. MINETA	)	
Secretary	)	
United States Department of	)	
Transportation,	)	
	)	
Defendant	)	

ORDER

This action, alleging age and race discrimination, is before the court on the Report and Recommendation of the Magistrate Judge [Doc. No. 40]. The plaintiff filed objections to the Magistrate Judge's Report on May 19, 2002 [Doc.No. 44]. Accordingly, the court conducts a *de novo* review of the portions of the Report and Recommendation

specifically objected to by the plaintiff. See 28 U.S.C.§ 636(b)(1).

Factual and Procedural Background

From 1972 until 2001, the plaintiff in this action, Charles E. McGregor ("McGregor"), worked for the Federal Aviation Administration ("FAA") in the Atlanta Air Route Traffic Control Center. In September 2000, McGregor applied for the position of temporary ("rotational") Traffic Management Coordinator ("TMC") in the Traffic Management Unit ("TMU") of the Atlanta Center. At the same time, McGregor submitted an application for the position of permanent TMC. McGregor, a fifty-two year-old black male, was not selected for either position. As a result of his nonselection, McGregor filed a charge of age and race discrimination with the Equal Employment Opportunity Commission ("EEOC"). After exhausting his administrative remedies, on December 3, 2001, McGregor filed the instant lawsuit.

In his complaint, McGregor alleges that he was discriminated against, as each of the individuals selected for

the temporary and permanent TMC positions were younger, white males. For six months, the parties engaged in extensive discovery. Thereafter, on October 24, 2002, Norman Y. Mineta ("Mineta"), the Secretary of the United States Department of Transportation and the named defendant in this action, filed a motion for summary judgment. Mineta argued that McGregor had insufficient evidence of discrimination to survive summary judgment. After the issues were fully briefed, Magistrate Judge Christopher Hagy recommended granting the defendant's motion for summary judgment. In the Report and Recommendation ("R&R"), Judge Hagy concludes that McGregor failed to demonstrate a genuine issue of material fact regarding whether or not his employer discriminated against him based on race or age.

The majority of the R&R focuses on the bases for the selection of employees to fill the rotational and permanent TMC positions. At the time McGregor applied for the rotational TMC position, there were four listed vacancies. Fourteen applications were submitted for the position, and

each applicant met the minimum qualification criteria. Likewise, when McGregor applied for the permanent TCM position, there was one vacancy. Thirteen applications were submitted for this position, and again, all met the minimum qualification criteria. Because each applicant qualified to apply, the applications were forwarded to Alton Self ("Self"), the recommending official for the permanent and rotational TMC positions. As part of the selection process, Self reviewed every application and solicited recommendations from various supervisors. Self then made recommendations to the deciding official, Mark Ward ("Ward"), who, in turn, selected the candidates for these positions based solely on Self's recommendations.

The defendant's evidence demonstrates that it failed to promote McGregor to the position of rotational or permanent TCM because the recommending official, Self, did not believe that McGregor was the best-qualified candidate for the available positions. According to Self, McGregor was not the best-qualified applicant for the rotational TMC

position because he had already served in that position from 1991 to 1992, thus, McGregor had already obtained the career enhancement and job diversity that comes from serving in the position. Further, Self indicated that, since all applicants met the minimum criteria, he gave preference to those individuals who had not yet served in the position, or those who had been previously selected to serve, but had been unable, for whatever reason, to do so. Of the five applicants chosen, three had no previous experience as a rotational TMC, while two had been selected, but unable to fill the position. Self also reported that McGregor had not received any positive recommendations for the position. Instead, Self testified that McGregor's supervisors stated that he had poor decision-making skills, had a tardiness problem, and had been observed asleep on the job. In contrast, Self claimed that the applicants chosen for the rotational TMC position received recommendations that endorsed their applications.

As for the permanent TMC position, Self again testified that McGregor was not the most-qualified applicant for two reasons. First, Self stated that a preference was given to employees currently serving in a rotational TMC position. The two applicants ultimately chosen had been serving in a rotational TCM assignment for a significant period of time. Second, Self reported that McGregor's supervisors had not extended his rotational TMC position in 1991-1992 beyond the initial year, and for the same reasons as the rotational TMC application, McGregor's supervisors did not support his current application for the permanent position.

Given these legitimate, nondiscriminatory reasons for McGregor's nonselection, the Magistrate Judge found that McGregor's evidence did not create a genuine issue of material fact regarding pretext. However, the plaintiff strenuously disagrees with the conclusion of the Magistrate Judge. In order to bolster his case, McGregor filed a motion to supplement the record [Doc. No. 41-1].

Specifically, McGregor asks the court to consider various interrogatory answers and responses to document requests. Subsequently, on May 19, 2003, the plaintiff filed objections to Judge Hagy's R&R Doc. No. 44-1]. With this background, the court now resolves the outstanding issues.

Motion to Supplement the Record

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedures 72(b), a district court may consider additional evidence after a Magistrate Judge has entered a R&R. The decision as to whether a party should be allowed to supplement the record is within the sound discretion of the district court. Drew v. Department of Corrections, 297 F.3d 1278, 1290 n.4 (11th Cir. 2002). Indeed, in the Eleventh Circuit, section 636(b)(1) has been interpreted to "confer[] broad discretion to the district judge to hear or dispense with "additional evidence. Id (quoting Wofford v. Wainwright, 748 F.2d 1505, 1507 (11th Cir. 1984).

In the instant action, McGregor asks to supplement the record with the defendant's answers to interrogatories and

document requests. Mineta does not specifically oppose McGregor's motion, instead conceding that "[t]he court has discretion pursuant to 28 U.S.C.§ 636(b)(1) to accept additional evidence submitted along with objections to a Magistrate Judge's R&R". In fact, the defendant "defers to the court's determination whether supplementary evidence should be accepted." As such, McGregor's motion to supplement the record is not opposed by the defendant.

The plaintiff claims that he should be allowed to supplement the record because Judge Hagy relied on legal theories in his R&R that were not advanced by the defendant in the motion for summary judgment or reply brief. Accordingly, McGregor contends that he has no reason to provide the proposed supplemental factual information to the court prior to the issuance of the R&R, as it is relevant only because of the new legal theories raised by Judge Hagy. However, the court disagrees with McGregor's characterization of the R&R. Each of the arguments relied on by Judge Hagy were, at the least, suggested by the defendant

in his summary judgment submissions. As such, the court believes that McGregor should have presented the additional information to the court during the Magistrate Judge's consideration of the summary judgment motion.

However, the court also finds that there is no prejudice to the defendant by allowing McGregor to add the supplemental documents to the record. In fact, the defendant feels that the additional evidence supports the conclusions of the R&R. Accordingly, the court exercises its discretion under 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b) to allow McGregor to supplement the record with the exhibits attached to his motion to supplement the records [Doc. No. 41-1].

Objections to the Magistrate Judge's Report and Recommendation

In analyzing McGregor's discrimination claims in the R&R, Judge Hagy employed the familiar, burden-shifting framework explicated by the Supreme Court in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973) and Texas Dep't

of Community Affairs v. Burdine, 450 U.S. 248 (1981). This framework is applicable to both race and age discrimination claims. See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997); Baker v. Sears Roebuck & Co., 903 F.2d 1515, 1519-20 (11th Cir. 1990). Under this framework, the plaintiff must first establish an inference of discriminatory intent through a prima facie case of discrimination. Combs v. Plantation Patterns, 106 F.3d 1519, 1527 (11th Cir. 1997). Then, if the plaintiff proffers sufficient evidence to satisfy the prima facie case, the defendant must demonstrate that there were legitimate, nondiscriminatory reasons for the actions the plaintiff claims to be discriminatory. Burdine, 450 U.S. at 253-54. Finally, if the defendant carries his burden regarding legitimate justifications, in order to prevail, the plaintiff must demonstrate that the defendant's proffered reasons are only a pretext for discrimination.[1] Id.

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[1] The court incorporates herein the Magistrate Judge's thorough presentation of the legal framework governing this case. Accordingly, the court does not reiterate, in full, the standards applicable to employment discrimination cases at the summary judgment stage.

Appendix B
11.b.

At the summary judgment stage, a plaintiff need only demonstrate that a genuine issue of material fact exists regarding the pretextual nature of the defendant's actions. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000). A plaintiff is entitled to survive summary judgment, if there is sufficient evidence to demonstrate the existence of a genuine issue of material fact regarding the truth of the employer's proffered reasons for its action. Combs, 106 F.3d at 1529. Accordingly, a plaintiff may survive summary judgment by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions [in the defendant's explanations] that a reasonable fact finder could find them unworthy of credence." Id. at 1538.

In his objections to the R&R, McGregor does not challenge Judge Hagy's conclusions regarding the first two stages of the McDonnell Douglas analysis. Specifically, McGregor does not contest the Magistrate Judge's findings regarding the plaintiff's satisfaction of the *prima facie* case

and the defendant's proffer of legitimate, nondiscriminatory reasons for McGregor's nonselection. Instead, McGregor vigorously disputes Judge Hagy's conclusions regarding pretext. In contrast to the Magistrate Judge's legal conclusions, McGregor believes that he has presented sufficient evidence to create a genuine issue of material fact regarding pretext. McGregor's specific objections are as follows:

1. ***McGregor objects to the Magistrate Judge's finding that McGregor's evidence regarding Gary Hicks and Gary Puerifoy does not demonstrate pretext.***

As presented above, Self claims that McGregor was not the best-qualified candidate for the position of rotational TMC. As one justification for that assessment, Self asserts that he gave a preference to employees who had never before served in a rotational TMC position. Because McGregor served as a rotational TMC from 1991 to 1992, Self concluded that other candidates were better-qualified. The plaintiff claims that this justification is pretextual for several

reasons. First, McGregor points to two employees – Gary Hicks ("Hicks") and Gary Pueriofy ("Puerifoy") – who allegedly served as a rotational TMC on more than one occasion. Because these individuals were selected more than once, McGregor believes that Self's preference for employees with no prior rotational TMC experience is inconsistent and pretextual.

However, as concluded by Judge Hagy, this court cannot accept that McGregor's evidence demonstrates pretext. Most importantly, McGregor has directed the court's attention to no evidence that the criteria used in selecting Hicks and Puerifoy for the second time were the same as those used in rejecting McGregor. Accepting the plaintiff's evidence as true, the plaintiff's submissions demonstrate that Hicks and Puerifoy were selected for their second terms prior to the time Self became the recommending official for the rotational TMC positions. Because a different decision-maker chose the candidates at the time of Hicks and Puerifoy's purported double selection, the plaintiff's evidence

regarding Hicks and Puerifoy simply does not demonstrate that Self's proffered nondiscriminatory reason is pretextual. A different decision-maker-the one who purportedly selected Hicks and Puerifoy on multiple occasions-may have given less weight to previous rotational TMC experience.

Also, even if the same selection criteria applied to McGregor, Hicks and Puerifoy, McGregor has presented no evidence that he was treated differently from Hicks and Puerifoy in the selection process. Notably, McGregor has presented no evidence of the circumstances surrounding Hicks and Puerifoy's alleged second selection. As noted by the Magistrate Judge, at the time of their dual selection, Hicks and Puerifoy could have been the only candidates applying for the rotational TMC positions, or all of the applicants could have already served as a rotational TMC on a previous occasion. Under these circumstances, Hicks and Puerifoy's second selection would be consistent with Self's proffered selection criteria. Given this lack of evidence about Hicks and

Puerifoy's selection as rotational TMC's, the court cannot conclude that Self's proffered reason is pretextual.

Recognizing the lack of relevant evidence, McGregor presents the defendant's interrogatory and document request responses. Therein, McGregor asks for records and information regarding the selection of other rotational TMC candidates. Although McGregor does not specifically ask for evidence during the relevant timeframe, the defendant's answers to other interrogatories indicate that McGregor could not have obtained such evidence from the FAA, due to the agency's document retention policy. Unless there is a challenge to a selection decision, the agency destroys the records of its promotion decisions after one year. Because McGregor could not obtain information from the FAA regarding the selection process for the rotational TMCs at the time when Hicks and Puerifoy were chosen for the second time, McGregor does not believe he should suffer summary judgment due to a lack of unobtainable evidence.

However, the plaintiff's argument overlooks the fact that the desired information could have been discovered through alternative channels. Official FAA records are not the only method of obtaining evidence about Hicks and Puerifoy's second selection to the rotational TMC positions. Indeed, the plaintiff could have deposed these two individuals to determine who made the selection decision. Then, McGregor could have deposed the individual who made the selection decision. Then, McGregor could have deposed the individual who made the selection decision. Moreover, McGregor could have further explored the issue with other candidates not selected when Hicks and Puerifoy were selected. Each of these steps could have revealed the information McGregor claims is unavailable from the FAA. With each of these alternative sources of information, the court cannot say that McGregor is prejudiced by the FAA's policy of discarding records after one year.

In addition, the limited evidence presented by McGregor does not necessarily demonstrate that these

individuals were selected on two occasions to serve two separate terms as a rotational TMC. In fact, the documents submitted by the plaintiff show that Puerifoy served as a rotational TMC for three months, but was unable to complete his one-year term. After some time, Puerifoy returned to the rotational TMC position and served the remainder of his first year, plus several extensions. Although less detail is provided about Hicks, the limited evidence presented by the plaintiff does not preclude a similar factual scenario for his service as a rotational TMC. Indeed, if Hicks and Puerifoy were re-selected for the position of rotational TMC due to an inability to complete their first, one-year term, then the re-selection of these individuals is consistent with Self's proffered selection criteria, not challenged by the plaintiff, that individuals previously selected, but unable to serve their terms, were given a preference in the application process.

Finally, McGregor cites Lathem v. Department of Children and Youth Services, for the proposition that employees with different job titles can be compared where

the defendant offers no evidence that the comparable employees operated under different workplace rules or policies. 172 F.3d 786, 793 (11th Cir. 1999). However, McGregor's citation is inapposite to the facts of the instant lawsuit. The issue in Lathem was whether an employee could demonstrate discrimination by showing that she was disciplined more harshly than a nonminority employee who had violated the same workplace policy. Id. Accordingly, the Eleventh Circuit was assessing a disparate discipline claim, where the same supervisor and investigator administered discipline to both employees. Id. Based on the identity of the decision-makers and the lack of other evidence demonstrating a change in workplace rules, the court found that the defendants had presented no legitimate reasons for the disparity in discipline of the two employees. Id.

Unlike the situation in Lathem, McGregor's claim is based on failure to promote, rather than disparate discipline. Accordingly, a comparison between the two cases is difficult to make. However, an important difference between the

factual scenario in Lathem, and the facts of the instant case, is that, in Lathem, there was evidence that the same decision-maker disciplined the minority and nonminority employees differently. In McGregor's case, the undisputed evidence demonstrates that Self was not the decision-maker for the rotational TMC positions when Hicks and Puerifoy were supposedly selected for a second time. Therefore, contrary to the plaintiff's assertion, it is not clear that these two employees were exposed to the same workplace rules as McGregor.

Another important factual distinction between Lathem and the instant case is that, in Lathem, there was clear evidence that the employees were treated disparately. For violating the same rule, the minority employee was terminated and the nonminority employee was transferred. Id. In contrast, McGregor has presented no evidence demonstrating that Hicks and Puerifoy were given preferential treatment. As previously noted, there is no evidence of the circumstances surrounding Hicks and

Puerifoy's alleged double selection, and as such, there is no evidence they were preferentially exposed to different selection criteria. Indeed, when Hicks and Puerifoy were selected for their second terms, they could have been the only applicants or each applicant could have already served as a rotational TMC. Based on these significant factual differences, the plaintiff's citation to Lathem v. Department of Children and Youth Services does not undermine the Magistrate Judge's analysis. Id.

Therefore, the plaintiff's first objection to Judge Hagy's R&R is hereby overruled. McGregor's evidence about Puerifoy and Hicks is insufficient to create a genuine issue of material fact regarding the veracity of Self's nondiscriminatory preference for applicants who had not previously served in a rotational TMC position.

2. *McGregor objects to the Magistrate Judge's finding that McGregor's three time selection as a temporary supervisor does not demonstrate pretext.*

McGregor also challenges Self's proffered nondiscriminatory preference for applicants with no prior experience as rotational TMCs by demonstrating that McGregor served three times as a temporary supervisor. McGregor believes that he would not have been selected as a temporary supervisor on three occasions, if there was actually a preference given in the rotational TMC selection process to those with no prior TMC experience.

However, the Magistrate Judge found that McGregor's multiple experiences as a temporary supervisor do not demonstrate that Self's alleged preference in the rotational TMC selection process is pretextual. Initially, Judge Hagy indicates that the undisputed evidence shows that a temporary supervisory position is a completely different job than a rotational TMC position. Because these are different positions, Judge Hagy emphasizes that the plaintiff provided no evidence demonstrating that the purpose of, and selection process for, the rotational TMC positions are the same as, or

similar to, the purpose of, and selection process for, the temporary supervisory positions.[2]

In his objections, the plaintiff attempts to avoid the ramifications of the Magistrate Judge's findings by arguing that a temporary supervisor position is a "higher-grade level" job than a rotational TMC position. According to the plaintiff the rotational TMC positions help an employee get into a management level position, while the temporary supervisory positions are, themselves, management level positions. However, the plaintiff's argument does not demonstrate that Self's explanation is pretextual. If, as the plaintiff argues, the temporary supervisory positions are higher level positions than the rotational TMC jobs, then a comparison between the two jobs and their selection processes is not relevant and cannot demonstrate pretext. In

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[2] Judge Hagy also concluded that the plaintiff had provided no evidence that Self was the decision-maker for McGregor's multiple selections as a temporary supervisor. Subsequent supplemental evidence submitted by the plaintiff shows that Self was the decision-maker for McGregor's last selection as a temporary supervisor. However, this revelation does not alter the Magistrate Judge's analysis.

fact, McGregor's argument that the temporary supervisory positions are higher level positions than the rotational TMC positions demonstrates that, in actuality, the jobs did not likely have the same purpose or selection processes. For a management level job, such as a temporary supervisor, it may have been important for the defendant to select someone with prior experience.

Because the two positions are admittedly different, reselection as a temporary supervisor does not demonstrate that Self's nondiscriminatory preference for applicants without prior experience as a rotational TMC is pretextual or untruthful. McGregor's reselection in a different, higher level job does not shed light on the selection process employed by Self for the rotational TMC position.

3. *McGregor objects to the Magistrate Judge's finding that he cannot demonstrate pretext by pointing to Self's failure to mention in the bid announcement and administrative proceedings*

that prior rotational TMC experience would be considered in selecting candidates.

As his next argument, the plaintiff contends that Self's alleged reliance on McGregor's prior experience in a rotational TMC position to select candidates other than the plaintiff is a pretextual excuse for age and race discrimination, because this criteria-lack of prior rotational TMC experience-was not published in the bid announcement, nor was it mentioned in Self's answer to an EEOC interrogatory requesting information on the process employed by Self to select candidates.[3] The Magistrate Judge found that the lack of publication of the criteria relied on by Self does not demonstrate pretext, because nothing in the bid announcement prevents Self from basing his recommendation for the rotational position, in part, on whether an applicant has previously served in that position. Because the bid announcement is silent on this issue, Judge Hagy found that

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[3] Specifically, EEOC interrogatory number seven asked Self to "describe in detail the process [he] used to make both vacancy announcement numbers' selections."

the lack of publication noted by the plaintiff was insufficient to establish pretext.

In so holding, the Magistrate Judge relied on Lee v. GTE Florida, Inc. for the proposition that shifting emphasis among or away from qualifications in a posted job description is not probative of pretext because the promotion process is dynamic. 226 F.3d 1249, 1255 n. 2 (11th Cir.2000). McGregor believes that the Magistrate Judge erred in applying the holding of Lee to the facts of the instant situation. Instead, McGregor believes that the instant action more closely resembles Durley v. APAC Inc., 236 F.3d 651,656-57 (11th Cir. 2000). In Durley, the Eleventh Circuit found a genuine issue of material fact regarding pretext, because there was evidence that, after promoting a male employee, the decision-maker developed a job description specifically favoring the qualities of the male employee over a female candidate. Id. Importantly, in Durley, the Eleventh Circuit relied on the testimony of a retired employee, who verified that a different job description had existed prior to

the promotion of the male. Id. Accordingly, evidence existed demonstrating that the Durley job description had been specifically tailored, after the promotion decision, to fit the qualifications of the male employee previously selected for the promotion. Id. Therefore, the Eleventh Circuit reversed the district court's grant of summary judgment, holding that the post-hoc change in relevant job criteria provided evidence of pretext. Id; see also Batey v. Stone, 24 F.3d 1330, 1334-35 (11th Cir. 1994) (finding that evidence of pretext existed where, among other evidence, a retired employee testified that job description matrices could be altered to prefer one candidate over another).

In the instant action, however, the plaintiff has pointed to no evidence that the defendant changed the criteria used for selecting a rotational TMC after McGregor applied for the position. Other than claiming that the court should apply Durley, rather than Lee, the plaintiff's objection does not cite any evidence showing that the criteria used to select rotational TMC candidates changed during or after the

application process. As such, McGregor has provided no evidence, similar to that in Durley, that Self's selection criteria were manufactured to favor younger, white TMC applicants. Indeed, as found by the Magistrate Judge, the bid announcement, on its face, does not define the only criteria to be used in ranking and selecting the next rotational TMC[4] As such, the bid announcement, being silent on the issue, does not preclude Self from giving a preference to those individuals who had not previously served in a rotational position. The fact that this consideration was not published in the bid announcement does not demonstrate that Self's claimed reliance thereon is pretextual.

Likewise, the Magistrate Judge found that Self's failure to specifically mention prior rotational TMC experience in response to an EEOC interrogatory requesting

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[4] The bid announcement does, however, state that candidates will be evaluated in accordance with Order 3330.1B, Appendix 9, Air Traffic Competitive Career Progression Plan. No party has provided this document to the court. Moreover, Self testified, without contradiction, that the FAA evaluation criteria were used to determine whether candidates met the minimum qualifications and not to determine the final selectees.

information on Self's selection procedures does not demonstrate that Self's rationale was pretextual. The court agrees with Judge Hagy's analysis, since, in answering other EEOC interrogatories, Self noted McGregor's prior experience as a reason for his nonselection. The plaintiff admits as such. Thus, it does not appear that Self manufactured this rationale, after the EEOC interrogatories, for the purpose of this lawsuit. Moreover, in answering the EEOC interrogatory regarding his decision-making process, Self reports that he considered "job diversity." Although Self does not specifically state, as desired by the plaintiff, that a requirement for the rotational position was "no prior experience in the TMU," his reference to job diversity indicates that he considered applicants' prior positions before selecting a candidate for promotion. This includes McGregor's prior experience as a rotational TMC. Accordingly, Self's explanation of his decision-making process in his answers to the EEOC interrogatories is consistent with Mineta's stated position that McGregor was

not chosen, in part, because he had already served in the rotational TMC position.

Because the plaintiff has pointed to no evidence demonstrating that Self acted inconsistently in applying selection criteria, the plaintiff has failed to create an issue of fact regarding pretext by showing that the criteria relied on by Self were not explicitly mentioned in the bid package. In this case, McGregor must do something more than point to the language f the bid material in order to raise a fact issue regarding discriminatory intent. Similarly, Self's responses to the EEOC interrogatories, although not as specific as the plaintiff desires, are consistent with his position that he considered McGregor's prior experience in the rotational TMC job in selecting other candidates in September 2000, Therefore, McGregor's third objection to the R&R overruled.

4. *McGregor objects to the Magistrate Judge's finding that there is no issue of fact regarding whether McGregor's application for the rotational and permanent TMC positions lacked supervisory support.*

As discussed above, Self testified that McGregor was not the best-qualified candidate for the rotational TMC position because he had already served in that position. Self also provides another, independent nondiscriminatory reason for not hiring McGregor into both the rotational and permanent TMC positions. Specifically, Self asserts that McGregor was not the best-qualified candidate because his application lacked support from the TMU supervisors. Self claims that McGregor was not recommended by any supervisor, and, in fact, these supervisors noted McGregor's tardiness problem and nonaggressive nature, as well as an incident where McGregor was allegedly discovered sleeping on the job. Without supervisory recommendations, Self believes that McGregor was not the most qualified candidate for the rotational and permanent TMC positions. Indeed, Self contends that the selected candidates were highly recommended by TMU supervisors.

At the summary judgment stage, McGregor attempted to demonstrate the pretextual nature of this allegedly

nondiscriminatory rationale. McGregor pointed to various letters of commendation and awards he received in the past, some from the same supervisors who failed to support his TMC applications. He also pointed to alleged inconsistencies in the testimony of three supervisors. Likewise, McGregor claimed that two supervisors told him, after the fact, that they gave him good recommendations. Rejecting McGregor's contentions, the Magistrate Judge found that McGregor had "failed to address the ultimate issue; namely, that one reason Defendant chose not to promote him was that he failed to secure support from any of his supervisors when he applied for the rotational [and permanent] position[s] in the fall of 2000." According to Judge Hagy, none of the evidence presented by the plaintiff contradicts the fact that Self received no positive recommendations for McGregor's application.

The plaintiff objects to Judge Hagy's findings, claiming that, in the Eleventh Circuit, a defendant employer can be charged with knowledge of the contents of an

employee's personnel file. Carter v. DecisionOne Corp., 133 F.3d 997,1003 (11th Cir. 1997) (finding that employer can be charged with knowledge of plaintiff's age where, among other evidence, employer had access to plaintiff's personnel file). Based on McGregor's personnel file, the plaintiff argues that "it should have been clear . . . that the lack of recommendations as well as the reasons for the lack of recommendations were not credible." More specifically, the plaintiff objects to the Magistrate Judge's finding because "documents in his personnel file would tend to show that a reasonable decision-maker would have disbelieved the 'cadre' of supervisors when or if, they failed to give favorable recommendations to the plaintiff."

As an initial matter, the court notes that Self has never claimed to be unaware of the contents of the plaintiff's personnel file, including his letters of commendation and awards. In fact, Self has repeatedly asserted that he relied on superlatives and awards received by the candidates in making his selection decisions. This reliance is supported by the

memo, drafted by Ward, officially announcing the selectees for the rotational positions, which notes that the selectees "have received numerous awards." Accordingly, Self's knowledge of the contents of plaintiff's personnel file is not at issue in this litigation.

However, contrary to the plaintiff's assertions, Self's knowledge of awards and accolades received by McGregor in the past does not create a fact issue regarding his reliance on current supervisory recommendations. See Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989) (holding that, although plaintiff's personnel file contained no record of insubordination, such evidence was insufficient to create a fact issue regarding employer's claim that the plaintiff was fired for insubordination). According to Self, he considered a candidate's awards and accolades, along with the current thoughts and recommendations of various supervisors. That supervisors commended McGregor in the past by placing letters in his personnel file does not challenge the fact that they did not recommend McGregor at the time he applied for

the rotational and permanent TMC positions. Past positive comments and awards do not constitute evidence that the plaintiff's supervisors recommended McGregor to Self in 2000. Much could have occurred between the posting of the positive comments in McGregor's personnel file and the meeting of supervisors conducted in the fall of 2000. To demonstrate pretext, McGregor needed to show that some supervisor actually recommended him to Self for a TMC position. McGregor has not produced such evidence. How McGregor performed in the past or what his supervisors earlier believed does not create a fact issue as to what was said and heard in 2000.

In fact, in an affidavit, McGregor admits that he had tardiness problems in the past. Although he contests the assertions that he was not aggressive enough for the job and that he was found asleep on the job, the truth of the underlying allegations does not change the fact that Self's uncontradicted testimony indicates that, at a meeting of supervisors, these individuals told Self that McGregor had

problems with tardiness and aggression and that he had been found asleep on the job. Even accepting McGregor's contention that his supervisors were mistaken about these facts, that contention does not establish pretext. Because "[a] plaintiff must show not merely that the defendant's employment decisions were mistaken, but that they were in fact motivated by race [or age]." Alexander v. Fulton County, GA., 207 F.3d 1303, 1339 (11th Cir. 2000); see also Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1261 (11th Cir. 2001); Lee, 226 F.3d at 1253. Indeed, in the Eleventh Circuit, an employer may make employment decisions "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984); see also Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000); Brown v. American Honda Motor Co., 939 F.2d 946, 951 (11th Cir. 1991).

Unfortunately for McGregor, the documentation included in his personnel file does not refute the uncontradicted testimony of Self[5] that no supervisor recommended McGregor for the TMC positions. No fact issue is created by the plaintiff's claim that his personnel file makes the lack of recommendations unworthy of credence. In the end, McGregor has presented no evidence that a supervisor actually recommended him to Self or that Self was not informed of problems regarding tardiness, sleeping, and aggressiveness. Likewise, McGregor has failed to demonstrate that the selected candidates had performance problems or were not recommended. Accordingly, McGregor's fourth objection to the Magistrate Judge's R&R is overruled.

> 5. *McGregor objects to the Magistrate Judge's conclusion that Murray Perkins' nonselection for the permanent TMC position does not demonstrate pretext.*

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[5] In fact, Self's testimony regarding McGregor's lack of supervisory recommendations is supported by the deposition testimony of other supervisors.

With regard to the permanent TMC position, Self again claims that McGregor was not the best-qualified candidate. In this regard, Self testifies he gave a preference to those applicants currently serving in a rotational TMC position. As such, Self claims that one legitimate reason why McGregor was not selected for the permanent TMC position is that he was not serving as a rotational TMC at t he time the applications were considered. In his summary judgment opposition brief, McGregor attempts to prove the pretextual nature of Self's rationale by arguing that Murray Perkins ("Perkins"), a black female applicant for t he permanent TMC position, was not promoted to permanent TMC, although, at the time of the vacancy, she was serving as a rotational TMC. In fact, she served as a rotational TMC for thirty-nine months prior to applying for the permanent position in September 2000.

Judge Hagy, however, found that McGregor's evidence was insufficient to demonstrate pretext. The Magistrate Judge emphasized that current service as a

rotational TMC was not the only factor analyzed in selecting the permanent TMC candidates. Self's uncontradicted testimony demonstrates that he considered a variety of other factors, including recommendations from supervisors, prior job experience, job diversity, current job performance, and personal interest. Because McGregor presented no evidence that Perkins was recommended by her supervisors or that Perkins had performed well in her position as a rotational TMC, Judge Hagy found that McGregor's evidence did not demonstrate that Self's asserted preference for applicants currently serving in rotational TMC positions were merely pretext for discrimination.

In his objection, the plaintiff argues that the Magistrate Judge improperly weighed evidence to find that Perkins had no supervisory recommendations and that Perkins did not perform well in her rotational TMC position. McGregor argues that the Magistrate Judge ignored Perkins' declaration, in favor of Self's testimony. McGregor even accuses the Magistrate Judge of "providing the rational for t

he employer's decision not to select Mc. [Perkins]." Accordingly, McGregor believes that the Magistrate Judge erred in determining that Self's preference for individuals serving as rotational TMCs is not pretext for discrimination.

In making his objection, McGregor presents part of Self's EEOC interrogatory rationale for not selecting Perkins. Therein, Self claims that Perkins was not selected because she did not have as much air traffic control experience as the selectees, she had not served as a temporary supervisor, she had not performed as well in the rotational TMC position as the selected candidates, and the chosen candidates received stronger recommendations than she did. Although McGregor presents Self's explanation, McGregor has provided no evidence to contradict Self's account. Notably, Perkins' declaration does not contradict or undermine Self's rationale.

In her declaration, Perkins does not dispute that the permanent TMC selectees had more air traffic control experience than she did, nor does Perkins dispute that she had no temporary supervisory experience. Moreover, Perkins

does not dispute that the other candidates received more supervisory support than she did. While Perkins testifies that one of her supervisors did all that he could do to support her application, such evidence does not challenge the fact that the selected candidates received more support, even with the work of Perkins' supervisor in favor of her application. There is no evidence to contradict Self's testimony that the selectees were strongly supported by supervisors. McGregor has not demonstrated that, in fact, the selected applicants received little or no support from supervisors. Indeed, the deposition testimony of various supervisors indicates that these individuals id receive supervisory support.

Likewise, Perkins' declaration does not contest the fact that the selected candidates had "consistently performed at a higher level than Ms. Perkins." While Perkins declares that she was never confronted with performance issues, and, in fact, she received good performance reviews, Perkins' personal performance does not demonstrate that she performed better than the selected candidates. Evidence of

her performance as a rotational TMC, without comparative evidence of the selected candidates' performance, cannot contradict Self's assertion that the selectees had performed at a consistently higher level than Perkins.

Despite presenting insufficient evidence to contradict Self's rationale for Perkins' nonselection, McGregor attacks some portions of Self's justification, arguing that Self's claims that other candidates performed at a higher level or received higher recommendations are too subjective and vague to serve as legitimate, nondiscriminatory reasons. See Chapman, 249 F.3d at 1033-35.[6] However, the Eleventh Circuit has found that subjective reasons can be legitimate, nondiscriminatory reasons, if they are sufficiently clearly articulated. Id., see also Bass v. Board of County Comm'rs., 256 F.3d 1095, 1105 (11th Cir. 2001) (finding that a

[6] Interestingly, the portion of the Chapman en banc decision cited by McGregor does not come from the majority opinion. 229 F.3d at 1043. Instead, McGregor cites the partially concurring and partially dissenting opinion. Id. In any event, it is not clear to the court that the criteria employed by Self are, in actuality, subjective criteria. Although they are clearly comparative criteria, they are not necessarily based purely on Self's opinions. Job performance and evaluation quality are capable of objective assessment.

subjective reason can constitute a legitimate, nondiscriminatory reason, if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion).

In the remainder of Self's EEOC interrogatories, Self articulates the bases for his conclusion that the permanent TMC selectees received higher recommendations and performed at a higher level than Perkins.[7] Specifically, Self explains that Perkins' performance for most of her tenure as a rotational TMC was below average or average. He claims that she did not improve her performance during the first two-and-a-half years of serving as a rotational TMC. Given her lack of improvement, McGregor asserts that the selected candidates performed at a higher level overall. Similarly, Self explains that the high recommendations given to the

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[7] Even if these explanations are overly subjective or disputed factually, Perkins' performance and recommendations were not the only reasons Self did not select Perkins. He also relied on her lack of temporary supervisory experience and years of air traffic control experience. On the current record, these undisputed, objective criteria are sufficient, nondiscriminatory bases for Perkins' nonselection.

selectees were based on overall job performance, spirit of cooperation, and commitment to success. With these explanations, McGregor's argument that the allegedly subjective criteria are too vague to be given credence fails. Instead, Self's reasons for not selecting Perkins have been clearly articulated. McGregor was capable of presenting meaningful rebuttal evidence.

Therefore, Mineta has articulated a variety of legitimate reasons for Perkins' nonselection as a permanent TMC. Given these legitimate justifications, Perkins' nonselection, although she was currently serving as a rotational TMC, does not demonstrate that Self's nondiscriminatory preference for individuals presently serving as rotational TMCs is pretextual. Most importantly, current service as a rotational TMC was never the single determinative factor in selecting the permanent TMCs. It was only one of several areas of consideration. In those other areas, the selected candidates ranked higher than Perkins. Given these alternative reasons for Perkins' nonselection, the

fact that she was a rotational TMC at the time she applied for the permanent TMC position does not demonstrate that Self's proffered legitimate, nondiscriminatory reason is pretextual. As such, McGregor's fifth objection to the R&R is overruled.

6. *McGregor objects to the Magistrate Judge's finding that Self's allegedly inconsistent consideration of total years of experience and temporary staff experience do not demonstrate pretext.*

In his brief in opposition to the defendant's motion for Summary judgment, McGregor argues that Self's inconsistent use of composite score data, including total years of work experience and temporary supervisory experience, demonstrates pretext. Specifically, McGregor points out that, in Self's EEOC interrogatories, he claims that Perkins did not get the job as permanent TMC, in part, because Hendricks and Puerifoy, the selected candidates, had more supervisory and years of experience than both Hendricks and Puerifoy. Accordingly, McGregor believes that, if Self's explanation to Perkins is correct, McGregor, rather than Hendricks and Puerifoy, should have been selected as a permanent TMC.

Therefore, the plaintiff believes that Self's rejection of Perkins, but failure to select McGregor, on these bases demonstrates an inconsistency in Self's legitimate, nondiscriminatory explanations.

The Magistrate Judge concluded that there is no evidence that Self factored an applicant's total years of work experience into making any of his recommendations. Without such evidence, Judge Hagy determined that McGregor's total years of experience were irrelevant to demonstrating pretext. Likewise, the Magistrate Judge determined that there is no evidence that McGregor's years of temporary supervisory experience related to the job of permanent TMC. Accordingly, the R&R dismisses McGregor's contention that Self inconsistently applied rating criteria.

In his objections, McGregor again points to Self's explanation for Perkins' nonselection. There, Self says that Perkins' lack of temporary supervisory experience and years of total experience factored into the decision to choose other

candidates as permanent TMCs. Because Self applied these criteria to reject Perkins, McGregor believes that Self should have also applied these criteria to select McGregor for the permanent position. In essence, the plaintiff argues that, based on Self's explanation to Perkins, McGregor is more qualified than the permanent TMC selectees.

In his objections, McGregor again points to Self's explanation for Perkins' nonselection. There, Self says that Perkins' lack of temporary supervisory experience and years of total experience factored into the decision to choose other candidates as permanent TMCs. Because Self applied these criteria to reject Perkins, McGregor believes that Self should have also applied these criteria to select McGregor for the permanent position. In essence, the plaintiff argues that, based on Self's explanation to Perkins, McGregor is more qualified than the permanent TMC selectees.

However, McGregor's objection overlooks a key difference between himself and Perkins. At the time of the vacancy announcement for the permanent TMC position,

Perkins was serving as a rotational TMC, and McGregor was not. According to Self's uncontradicted testimony, he gave a preference to those individuals already serving as rotational TMCs at the time of the selection process. Because McGregor was not a rotational TMC at the time, Self did not need to compare McGregor's years of experience and temporary supervisory experience with those of Hendricks and Puerifoy. But, since Perkins, Hendricks, and Puerifoy were each serving as rotational TMCs, Self had to look to other factors to distinguish between these candidates. Only at that point did Self need to consider total years of experience and temporary supervisory experience. Self's failure to compare McGregor, Hendricks, and Puerifoy on these bases is consistent with his claim that he gave a preference to those individuals currently serving as rotational TMCs.

Moreover, even, if Self h ad looked to McGregor's total years of experience and time as a temporary supervisor, it is not clear that McGregor would have been more qualified than Hendricks and Puerifoy. Notably, Self never looked to

work experience in a vacuum. Instead, he looked at work experience together with recommendations, job diversity, awards, education, current position, past job performance, and personal interest. Considering all of these factors collectively, McGregor is not necessarily more qualified than Hendricks and Puerifoy.

Finally, even if McGregor can be considered more qualified than Hendricks and Puerifoy in some respects, superior qualifications alone are insufficient to demonstrate pretext, in the Eleventh Circuit, unless they are so stark as to "virtually jump[] off the page and slap[][one in the face." Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1277 (11th Cir. 2002); see also Cofield v. Goldkist, Inc. 267 F.3d 1264, 1268 (11th Cir. 2001). In the instant action, the court cannot say that the disparity between Hendricks, Puerifoy, and McGregor's qualifications is so great that a reasonable fact finder could infer that the defendant did not believe Hendricks and Puerifoy to be better qualified. Id. Accordingly, McGregor's argument regarding total years of

work experience and time in temporary supervisory positions-two isolated criteria considered by Self in conjunction with other factors-does not demonstrate pretext.

7. McGregor objects to the Magistrate Judge's finding that Ian McMillian had insufficient personal knowledge to testify regarding the policies and practices of the TMU in selecting applicants for the TMC positions.

The plaintiff's final argument that all of Self's proffered, legitimate reasons are pretextual is that Self inconsistently applied the policies and practices of the TMU in hiring candidates for the permanent and rotational TMC positions. For this assertion, McGregor relies on the testimony of Ian McMillian ("McMillan"), the Equal Employment Manager for the FAA's Southern Region. McMillian testifies that, for at least one of the controverted vacancies, the TMU was to use a composite scoring system to select the candidates. Because McGregor was one of the highest scoring candidates for both the rotational and permanent TMC bids, McGregor believes that Self's failure

to use the composite scoring data demonstrates pretext and discriminatory intent.

In the R&R, Judge Hagy dismissed McGregor's argument. The Magistrate Judge believed that McMillian, an FAA Civil Rights Office employee, had insufficient personal knowledge about the practices and policies of the TMU to testify about the procedure used to select candidates for the permanent and rotational TMC positions. The Magistrate Judge focused on the source of McMillian's statement that a composite scoring system was to be used. When pressed to define how he knew the TMU was to utilize composite scoring, McMillian answered that he had asked the TMU h uman resources unit and had been so informed. Given this testimony, Judge Hagy determined that McMillian had insufficient personal knowledge to create a fact issue on the proper policies and procedures Self was to employ.

McGregor objects to the Magistrate Judge's finding. The plaintiff argues that McMillian has personal knowledge of the TMU's policies and procedures due to the nature of his

job. Because he was required to review all bid applications and assess them for evidence of discrimination, McGregor argues that McMillian had to be knowledgeable of the appropriate assessment procedures, or he would be incapable of performing his job. McGregor also cites to other evidence explicating the role of the Civil Rights Office in the candidate selection procedure. Accordingly, with McMillian's testimony that the TMU was to use a composite scoring system to select the permanent and rotational TMCs, McGregor believes that he can demonstrate the pretextual nature of Self's proffered nondiscriminatory reasons for McGregor's nonselection.

The plaintiff argues that McMillian's testimony demonstrates that self inconsistently applied TMU policy. But, review of McMillian's deposition testimony reveals that, at no point, does McMillian say that it was general TMU policy to use a composite scoring system to select candidates. Throughout his testimony, McMillian emphasizes that, on numerous occasions, the TMU never testifies, as argued by

the plaintiff, that a composite method was to be used for both the permanent and rotational TMC positions. Instead, he repeatedly says that only on of the positions for which McGregor applied was to be assessed with the scoring system. He never clarifies which position.

As noted by the Magistrate Judge, however, McMillian's source for this information is the human resources department of the TMU. Undisputedly, the human resources department of the TmU was not responsible for the final selection of the rotational and permanent TMC candidates. Instead, human resources was only responsible for determining if each applicant met the minimum eligibility requirements. Admittedly, each applicant was minimally qualified for the permanent and rotational TMC positions. Therefore, as concluded by Judge Hagy, it is unlikely that McMillian had sufficient personal knowledge, based on his conversation with human resources, of TMU procedures to testify as to the selection method to be employed by Self for the permanent and rotational TMC jobs.

Appendix B
53.b.

Moreover, even if the court accepted McMililan's testimony regarding the policy to be employed by Self in selecting TMCs, the court would not conclude that McGregor had created a fact issue regarding the pretextual nature of Self's explanations. Notably, in the Eleventh Circuit, deviation from a company policy, standing alone, does not demonstrate discriminatory animus. Mitchell v. USBI Co., 186 F.3d 1352, 1355-56 Cir. 1999); Thomas v. Dade County Public Health Trust, 177 F. Supp. 2d 1283, 1292 (S.D. Fla. 2001)(finding that demonstrating a company's deviation from its policy alone is not sufficient to establish a prime facie case of discrimination); Dowell v. Prime Healthcare Corp, No. 00-D-686-E, 2001 WL611198, at *10(M.D. Ala. May 4, 2001) (holding that deviation from a company policy does not establish pretextual behavior). With Self's multiple nondiscriminatory reasons for McGregor's nonselection, Self's alleged deviation from TMU composite scoring standards in selecting candidates is insufficient to demonstrate pretext and discriminatory intent.

Importantly, even accepting McMillian's testimony, McGregor has failed to establish that the TMU applied its composite scoring data inconsistently. See Berg v. Florida Dep't of Labor & Emp't Sec.163 F.3d 1251, 1255 (11th Cir. 1998) (finding that inconsistent application of employment policies may demonstrate pretext). Indeed, the plaintiff has provided no evidence that Self used scoring data to select any candidate for the permanent and rotational TMC positions. Id. (rejecting plaintiff's claim of inconsistency because plaintiff failed to show that defendant employed policy in first place, let alone in an inconsistent manner). Because there is no evidence Self used candidates' scores to make his selections, there is no evidence that Self used the composite scores to select younger, white candidates, but overlooked the composite scores in reference to McGregor.[8] Without such

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[8] The plaintiff has provided the court with the composite scoring data for eight applicants. However, McGregor has not provided the court with the scores for each of the other applicants. Importantly, McGregor has not even provided the score for one of the selected candidates for the rotational TMC position. Without evidence of each of the candidate's scores, the court cannot infer, as the plaintiff desires, that Self used the highest scores, except

evidence of inconsistent application, McGregor's claim of pretext based on McMillian's testimony fails. Id; see also Thomas 177 F.Supp.2d at 1291-92 (rejecting plaintiff's claim of pretext based on inconsistent application of policies because plaintiff presented no evidence that defendant applied these policies to others or that defendant applied these policies inconsistently); Dowell, 2001 WL 611198, at *10 (same).

Therefore, the court cannot accept McGregor's argument that McMillian's testimony, if considered, demonstrates pretext. Even if the Magistrate Judge erred in concluding that McMillian lacked personal knowledge sufficient to testify as to TMU policies, McGregor has failed to show that Self applied the composite scoring procedure in an inconsistent manner. Accordingly, McGregor's objection is of no merit.

8. Conclusion

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when it came to the minorities. Indeed, Self's failure to use the composite scores could have displaced, not only McGregor, but also other younger, white males. Such a result would militate against a finding of discriminatory intent.

It is well-established law that once an employer has articulated one or more legitimate, nondiscriminatory reasons for a challenged employment action, a plaintiff must come forward with evidence sufficient to raise a genuine issue of fact as to whether the employer's stated reasons are pretextual or unworthy of credence. Combs 106 F.3d at 1538-43; Walker, 286 F.3d at 1274. As the Eleventh Circuit explained, "[i]f the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment" Chapman 299 F.3d at 1024-25. In the instant action, Mineta is entitled to summary judgment because McGregor has failed to identify sufficient admissible evidence establishing pretext, and he has failed to cure the evidentiary deficiencies presented in the R&R.

SUMMARY

Based on the foregoing, the court OVERRULES McGregor's objections and, together with this order,

ADOPTS the Report and Recommendation of the Magistrate Judge [Doc. No. 40-1]. Also the court GRANTS McGregor's motion to supplement the record [Doc. No. 41-1], and the court DENIES the defendant's motion to strike the plaintiff's second objection to the Report and Recommendation [Doc. No. 45].

IT IS SO ORDERED, this 10th day of June, 2003.

/s/

BEVERLY B. MARTIN
United States District Judge

Appendix C
1.c.

APPENDIX C- MAGISTRATE JUDGE REPORT AND RECOMMENDATION ENTERED ON APRIL 30, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHARLES E. MCGREGOR,	)	CIVIL ACTION
	)	1:01-CV-3303-BBM
Plaintiff	)	
	)	
V.	)	
	)	
NORMAN Y. MINETA,	)	FINAL REPORT AND
Secretary U.S. Department	)	RECOMMENDATION
Of Transportation	)	IN AN EMPLOY-
	)	MENT DISCRIMINA-
Defendant.	)	TION ACTION

Plaintiff filed the above-styled civil action on December 3, 2001. He claims that Defendant discriminated against him on the basis of race (African-American) and age (52) and failed to promote him in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 633(a).

The action is presently before the Court on Defendant's Motion for Summary Judgment [24]. For the reasons discussed below, the undersigned **RECOMMENDS**

that Defendant's Motion be **GRANTED** and that judgment be entered in favor of Defendant on all counts of Plaintiff's Complaint.

I. BACKGROUND FACTS

Unless otherwise indicated, the Court draws the undisputed facts from Defendant's "Statement of Material Facts [as to which there is no genuine issue]" (SMF"). If, however, Plaintiff has disputed a specific fact and pointed to evidence in the record supporting his version of events, the Court has viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986); McCabe v. Sharrett, 12 F.3d 1558, 1560 (11th Cir. 1994); Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993).

On September 25, 2000, Plaintiff, an Air Traffic Control Specialist ("ATCS") in the Atlanta Air Route Traffic

Control Center (ARTCC"), submitted an application for the position of a temporary ("rotational") Traffic Management Coordinator ("TMC") within the Traffic Management Unit ("TMU") of the ARTCC. D. SMF ¶ 3. Plaintiff had previously served in this position from 1991 to 1992. D. SMF ¶ 23.

The purpose of the rotational TMC position is to provide an ATCS with career enhancing opportunities by providing job diversity, more experience and more knowledge about the National Airspace System. D. SMC ¶ 8. An ATCS generally does not serve more than one rotation as a temporary TMC and the position lasts for one year; however, it could be extended for an additional year at the discretion of the Supervisory Traffic Management Coordinator ("supervisor"), a member of the TMU. DF. SMF ¶¶ 6, 9. There were seven supervisors in the TMU in the fall of 2000. Deposition of Alton Self ("Self Depo") at 14, 15.

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4.c.

At the time Plaintiff applied for the rotational TMC position there were four listed vacancies[1]. Fourteen (14) applications were submitted for this position. D. SMG ¶ 11. All fourteen applicants met the minimum qualifications and their applications were forwarded to the selecting official. D. SMF ¶ 13.

On September 25, 2000, Plaintiff also applied for the position of permanent TMC. D. SMF ¶ 4. At the time Plaintiff applied for the permanent TMC position there was one vacancy[2]. Thirteen (13) applications were submitted for this position. D. SMF ¶ 14. All thirteen applicants met the minimum qualifications and their applications were forwarded to the recommending official. D. SMF ¶ 16.

The duties of both a rotational and permanent TMC are to insure that efficient and effective traffic management is

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[1] While only four vacancies were announced for the position of temporary TMC in September of 2000, ultimately five applicants were chosen. Defendant's Exhibits in Support of Motion for Summary Judgment ("D. Exh.") tab 5.

[2]While only one vacancy was listed for the position of permanent TMC in September of 2000, ultimately two applicants were chosen. D. Exh. Tab 6.

maintained by metering the flow of air traffic and providing information about arriving and departing air traffic to the ATCS's working in the different sectors of the ARTCC. D. SMF ¶ 5. Those selected for either position would work directly for one of the Traffic Management Unit's supervisors. D. SMF ¶ 7.

The recommending official for both the rotational and permanent TMC positions was Alton Self, the TMU Traffic Management Officer responsible for the operation of the TMU[3] D. SMF ¶ 17. As part of the selection process, Mr. Self reviewed every application and solicited recommendations from the supervisors in the TMU. D. SMF ¶ 18. Mr. Self then made recommendations to the deciding official, Mark Ward, who in turn selected the candidates for both positions based on these recommendations. D. SMF ¶ 33. Plaintiff was not chosen for either position. D. SMF ¶¶ 31, 32.

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[3] Mr. Self was also directly responsible for the supervisors in the TMU. Self Depo at 14.

On December 14, 2000, Plaintiff contacted an EEO Counselor, Margot Mahoney, alleging that Defendant had failed to promote him on the basis of race and age. D. Exh. Tax 23. Ms. Mahoney interviewed Plaintiff on December 16, 2000 in an attempt to resolve the matter. Id. They were unable to resolve the matter and Ms. Mahoney issued Plaintiff a Notice of Right to File a Formal Complaint on January 23, 2001. Id.

On January 24, 2001, Plaintiff filed a Complaint of Discrimination against the Federal Government with the Department of Transportation ("DOT"), alleging he was denied promotions based on race and age. D. Exh. Tab 10. The DOT has taken no final action with regard to Plaintiff's complaint. Plaintiff filed his Title VII and ADEA claims on December 3, 2001, more than 180 days after filing his complaint with the DOT. D. SMF ¶ 35.

Because many of the Court's findings of fact are intertwined with its analysis of whether the parties have met

their respective evidentiary burdens, the remaining relevant facts are set forth in the Discussion below.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 175, 90 S Ct. 1598, 26 L. Ed. 2d 142 (1970); Bingham, Ltd. V. United States, 724 F.2d 921. 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). In making its determination, the court must view the evidence

and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. See Anderson, 477 U.S. at 249; Ryder Int' Corp. v. Firsts American Nat'l Bank, 943 F.2d 1521, 1523

(11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. Anderson, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suite will not properly preclude the entry of summary judgment. Id.

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. Id. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Id. at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. Matsushita, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. Id. at 586. "Where the record taken as a whole could not lead a

rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253 289, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson. 477 U.S. at 259.

B. STANDARDS OF PROOF IN TITLE VII AND ADEA CLAIMS

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1). The ADEA makes it unlawful to discriminate in employment matters on the basis of age. 29 U.S.C. § 621, et seq.

Appendix C
11.c.

To prevail on a Title VII or ADEA claim, a plaintiff must prove that the defendant acted with discriminatory intent. Hawkins v. Ceco Corp., 883 F.2d 977, 890-981 (11th Cir. 1989); Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). Such discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged test set out for Title VII cases in McDonnell Douglas Corp. v. Green. 411 U.S. 792 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973); see Walker v. Nations Bank of Florida, N.A., 53 F.3d 1548, 1555-56 (11th Cir. 1995) (holding that under the ADEA, a plaintiff must establish discriminatory intent based on age through the presentation of either direct evidence or circumstantial evidence).

Direct evidence is defined as "evidence, which if believed, proves existence of fact in issue without inference or presumption." Black's Law Dictionary 413 (6th ed. 1990); see also Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226, (11th Cir. 1993); Carter v. City of Miami, 870 F.2d 578, 581-

82 (11th Cir. 1989); Rollins v. TechSouth, Inc. 833 F.2d 1525, 1528 n.6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. Clark, 990 F.2d at 1226; Carter, 870 F.2d at 581. Evidence that only suggests discrimination, See Earley v. Champion Intern. Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1996), does not constitute direct evidence. "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliatory complained of by the employee." Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998).

When a plaintiff establishes a prima facie case of discrimination by direct evidence of an intent to discriminate, the burden then shifts to the defendant to prove by a preponderance of the evidence that it would have made the same employment decision in the absence of any discriminatory motivation. Wall v. Trust Co., 946 F.2d 805, 809 (11th Cir. 1991); Hill v. Metropolitan Atlanta Rapid

Transit Auth. 841 F.2d 1533, 1539 (11th Cir. 1988); Smith v. Horner, 839 F.2d 1530, 1536 (11th Cir. 1988).

Evidence that merely "suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence" is, by definition, circumstantial. Early v. Champion Int'l Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent I both Title VII and ADEA claims, using the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed.2d 207 (1981). See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997); Jason v. Arrow Co., 75 F.3d 1528, 1531 (11th Cir. 1996). Under this framework, a plaintiff is first required to create an inference of discriminatory intent, and thus carries the initial burden of establishing a prima facie case of discrimination. McDonnell

Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; see also Jones v. Bessemer Carraway Medical Cir., 137 F.3d 1306, 1310, reh'g denied and opinion superseded in part, 151 F.3d 1321 (11th Cir. 1998); Combs v. Plantation Patterns, 106 F.3d 1519, 1527 (11th Cir. 1997); Walker, 53 F.3d at 1555.

Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. Jones, 137 F.3d at 1310-1311; Holifield, 115 F.3d at 1562 (citations omitted); see Burdine, 450 U.S. at 253-54, 101 S. Ct. at 1093-4. Once the plaintiff establishes a prima facie case, the defendant must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Jones, 137 F.3d at 1310; Walker, 53 F.3d at 1556. This burden is "exceedingly light" in comparison to the burden required if the plaintiff has presented direct evidence of discrimination. Smith v. Horner, 839 F.2d 1530, 1537 (11th Cir. 1988). If the defendant is able to carry this burden and explain its rationale, the plaintiff, in

order to prevail, must then show that the proffered reason is merely a pretext for discrimination. See Burdine, 450 U.S. at 253-54, 101 S. Ct. at 1093-4; Perryman v. Johnson Products Co. 698 F.2d 1138, 1142 (11th Cir. 1983); Walker 53 F.3d at 1556.

A plaintiff is entitled to survive a defendant's motion for summary judgment if there is sufficient evidence to demonstrate the existence of a genuine issue of material fact regarding the truth of the employer's proffered reasons for its actions. Combs, 106 F.3d at 1529. A prima facie case along with sufficient evidence to reject the employer's explanation is all that is needed to permit a finding of intentional discrimination. Reeves v. Sanderson Plumbing Prod., Inc. 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000); see also St. Mary's Honor Ctr. V. Hicks 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993); Combs, 106 F.3d at 1529.

This McDonnell Douglas-Burdine proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the

evidence in light of common experience as it bears on the critical question of discrimination." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482, 75 L. Ed.2d 403 (1983); see also Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. Nix v. WLCY Radio/Rehall Comm., 738 F.2d 1181, 1184 (L11th Cir. 1984). The "ultimate question" is not whether a plaintiff has established a prima facie case or demonstrated pretext, but "whether the defendant intentionally discriminated against the plaintiff." Id., 738 F.2d at 1184 (quoting Aikens, 460 U.S. at 713-14, 103 S. Ct. at 1481-82); see also Jones, 137 F.3d at 1313. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. Burdine, 450 U.S. at 253.

C. PLAINTIFF'S CLAIM

Plaintiff has produced no direct evidence of any discriminatory intent on behalf of the Defendant; thus, his claim of discriminatory treatment rest purely on circumstantial evidence and must be analyzed under the McDonnell Douglas-Burdine framework[4]. Plaintiff has asserted one claim: failure to promote based on race and age.

1. Failure to Promote

a. Prima Facie Case

In order to establish a prima facie case of race or age discrimination, Plaintiff must show that: (1) he is a member of a protected class[5]; (2) he was qualified for and applied for

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[4] Although age discrimination is not covered by the provisions of Title VII, the Eleventh Circuit has held that the McDonnell Douglas framework in analyzing claims of discrimination under Title VII is equally applicable to analyzing claims of age discrimination under the ADEA. See Baker v. Sears, Roebuck & Co., 903 F.2d 1515, 1519-1520 (11th Cir. 1990); Pace v. Southern Railway Sys. 701 F.2d 1383, 1385-1386 (11th Cir. 1983).

[5] Persons over the age of forty are members of the protected class for purposes of analysis of a prima facie case under the ADEA. See e.g. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998); Cf. O'Connor V. Consolidated Coin Caterers Corp., 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (stating that an

the promotion; (3) he was rejected in spite of his qualifications. and (4) the individual who received the promotion is not a member of his protected class. See Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002); Walker v. Morthan, 158 F.3d 1177, 1193, reh'g denied, 167 F.3d 542 (11th Cir. 1998); see also McDonnell Douglas, 411 U.S. at 802.

Defendant concedes that Plaintiff can establish the first three elements of his prima facie case. Defendant, however, relies on a line of Eleventh Circuit cases which state that a plaintiff, to satisfy the final element of their prima facie case, must establish that the individual who received the promotion was not a member of the plaintiff's protected class **and** had equal or lesser qualifications than the plaintiff. see Defendant's Brief in Support of Motion for Summary Judgment ("Defendant's Brief") at 15.

ADEA plaintiff must show that he was replaced by someone "substantially younger," not necessarily by someone under age 40).

Prior to the decision in Walker v. Mortham, many Eleventh Circuit opinions supported Defendant's position and required a plaintiff to show, as part of his prima facie case of discrimination, that the person who received the promotion has "lesser or equal qualifications" than the plaintiff. see e.g., Wu v. Thomas, 847 F.2d 1480, 1483 (11th Cir. 1988). Walker overruled those decisions, holding that a plaintiff need not present evidence of relative qualifications at the prima facie stage, and need only present evidence of his or her superior qualifications at the pretext stage, in order to rebut a defendant's evidence that the person promoted has superior qualifications. Walker at 1193. Defendant's argument as to relative qualifications, therefore, no longer has supporting precedent in the Eleventh Circuit.

As the Defendant has argued only relative qualifications, but has conceded not only the first three elements of a prima facie case, but also that Plaintiff can establish that the selected employees were not African-American and were significantly younger than Plaintiff,

Plaintiff has established a prima facie case of discrimination based on race and age.

b. Defendant's Legitimate Non-discriminatory reasons

Defendant has presented evidence that it failed to promote Plaintiff to the position of either rotational or permanent TMC because the recommending official, Alton Self, did not believe that Plaintiff was the best-qualified candidate, for the available positions. Self Deop at 33-42, 69-75.

According to Mr. Self, Plaintiff was not the best qualified applicant for rotational TMC position because he had already served in that position from 1991 to 1992; thus, he had already obtained the "career enhancement" that comes from serving in that position. D. SMC ¶ 23. Further, Mr. Self indicated that, because all the applicants met the minimum qualifications, he gave preference to those applicants who had not yet served in the position, or who had been selected to serve in the position but had been unable to

do so. D. SMF ¶ 19, 20. Of the five applicants chosen, three had no previous experience as a rotational TMC while two had been selected but had been unable to fill the position. D. SMF ¶ 31. Finally, Mr. Self reported that Plaintiff did not receive any positive recommendations for the position. D. SMF ¶¶ 24-29. The applicants ultimately chosen, however, had received recommendations that endorsed their application. D. SMC ¶ 31.

Mr. Self stated that Plaintiff was not the best qualified applicant for the permanent TMC position for two reasons. First, preference for that position was given to employees currently serving in a rotational TMC assignment. D. SMF ¶ 19. The two applicants selected for that position had been serving in a rotational TMC capacity for a significant amount of time. D. SMF ¶32. Plaintiff, however, was not a rotational TMC at the time. Second, Plaintiff's supervisors had not extended his position as a rotational TMC in 1991-1992 beyond the initial year, and did not support him in his

current application for the permanent position. D. SMF ¶¶ 24-29.

Finally, Mr. Self stated that Plaintiff had not been chosen for either the rotational or permanent TMC position because his supervisors had stated that Plaintiff: had poor decision making skills; had a tardiness problem, and had been observed sitting with his eyes closed while he was supposed to be working. D. SMF ¶¶ 27, 29.

Accordingly, the Defendant has satisfied his burden of producing a legitimate, non-discriminatory reason for his failure to promote Plaintiff to either the rotational or permanent TMC positions. Under the McDonnell Douglas framework, the burden thus shifts to Plaintiff to present evidence that Defendant's proffered reasons were a mere pretext for unlawful discrimination.

c. Pretext

Plaintiff may carry his burden of showing that the employer's proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors

motivating the decision, or that the stated reasons were insufficient to motivate the decision. Plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. See Burdine, 450 U.S. at 256. In other words, Plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable fact finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. See Reeves 530 U.S. at 149.

i. Pretext in the Selection of the Rotational TMC Position

Defendant's asserted legitimate, non-discriminatory reasons for not promotion Plaintiff to the temporary TMC position are that he: (a) had already served in that position and thus did not stand to benefit from serving another

rotation; and (b) lacked recommendations from his supervisors[6].

(a) Previous Rotation Assignment

Plaintiff argues that Alton Self's recommendation not to promote him to the rotational TMC position because he had already served in that position was subjective, inconsistent, and thus pretextual. Plaintiff's Brief in Opposition to Motion for Summary Judgment ("Plaintiff's Brief") at 5, 6.

In support of this argument, Plaintiff has offered the following evidence (1) Gary Puerifoy, a younger, white employee, had served twice in a rotational TMC position; (2) Plaintiff had been selected for three temporary supervisory positions; (3) there was no published criteria in the bid announcement that precluded an applicant from having previously served in a rotational TMC position, and (4) Mr.

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[6] This is Plaintiff's only argument which applies to both the rotational and permanent TMC positions. As such, the evidence Plaintiff relies on to support his argument applies to both positions in the same way. To avoid repeating its analysis, the Court will address this argument in its discussion of the rotational TMC position, but its discussion and conclusion are equally applicable to the permanent TMC position.

Self made no mention of this factor during the administration proceedings.

(1) Gary Puerifoy

Plaintiff has produced evidence that Gary Puerifoy, a young, white employee, had twice served in the rotational TMC position[7].

This reference, however, is not helpful. Mr. Puerifoy was not selected for the rotational TMC position sought by Plaintiff. Instead, he had been selected for that position in 1994 and 1996. Plaintiff's Exhibits in Opposition to Defendant's Motion for Summary Judgment ("P. Exh,") tab B-3. On these occasions, he was recommended for the rotational TMC position by someone other than Mr. Self, the

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[7] Plaintiff also testified that Gary Hicks, a white male, had served in the rotational TMC position twice. Plaintiff, however, has offered no evidence as to when Mr. Hicks served in these positions or as to who chose Mr. Hicks for these positions. Without such evidence, the undersigned can not determine with any certainty; (a) whether Mr. Hicks was promoted under the same criteria employed by Mr. Self in choosing applicants for the position of rotational TMC in the fall of 2000; or (b) whether any persons other than Mr. Hicks sought the position when he did, and, if so, how they matched up with whatever criteria was being applied in selecting the successful applicant. Accordingly, Mr. Hicks cannot be used as a comparator to Plaintiff or as evidence of pretext.

recommending official for the rotational and permanent TMC positions in the fall of 2000[8]. Mr. Self, in fact, did not become the recommending official for this position until March of 2000. Self Depo at 12, 13. Plaintiff has offered no evidence that the FAA used the same hiring criteria for the rotational TMC position in 1996 (when Mr. Puerifoy was selected for the second time) as it did in 2000.

Further, Plaintiff was provided no evidence as to either the number of positions available in 1996 or the number and prior experience of applicants for the position. For all this Court knows, Mr. Puerifoy was the only applicant in 1996. Without evidence of the FAA's hiring criteria in 1996 and the applicant pool for the rotational TMC positions from which it selected Mr. Puerifoy at that time, Plaintiff's argument does not show pretext because there is no basis for

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[8]Mark Ward, the individual who ultimately selected the applicants for the rotational and permanent positions, testified that he relied solely on Mr. Self's recommendations in making his decisions. Deposition of Mark Ward at 34. Therefore, for purposes of this discussion, Mr. Self is the relevant decisionmaker. In any event, Mr. Ward did not begin working in Atlanta until 1997 and thus, like Mr. Self, was not the decisionmaker at the time that Mr. Puerifoy was twice selected for the rotational TMC positions. Id. at 15, 16.

the undersigned to compare actions taken by different decisionmakers four years apart.

(2) Temporary Supervisory Positions

Plaintiff argues that he had previously been selected for three temporary supervisory positions[9]; thus, Defendant's contention that he can not serve in the rotational TMC position twice is inconsistent. Plaintiff's Brief at 5, 6. Plaintiff, however, has introduced no evidence to show that either the selection process or the purpose for the temporary supervisory position and the rotational TMC position are the same or that Mr. Self was the recommending official for both positions. Without such evidence, any comparison of the selection processes for these two positions falls short of supporting an argument that the decision to promote an applicant who had not previously served in a rotational TMC position is pretextual.

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[9] The Court notes that the "temporary supervisor" position is not the same as either the rotational or permanent TMC position. Self Depo at 27, 28.

(3) No Published Criteria

Plaintiff argues that there was no published criteria in the bid announcement ("announcement") for the rotational TMC position that precluded an applicant from having previously served in that position. Plaintiff's Brief at 5. Upon a review of that announcement, however, the Court could find nothing which precluded Mr. Self from basing his recommendation for the rotational position, in part, on whether an applicant had previously served in that position. In short, the announcement is silent as to this issue. See D. Exh. Tax 3. As such, the undersigned cannot, with any certainty, infer from the face of the announcement that Mr. Self acted inconsistently or applied hiring criteria in a subjective manner in his reliance on an applicant' prior experience as a rotational TMC. See Lee v. GTE Florida, Inc. 226 F.3d 1249, 1255 n. 2 (11th Cir. 2000)(noting that a shift in emphasis among or away from qualifications in a posted job description is not probative of pretext because the promotion process is dynamic).

(4) Administrative Proceedings

Plaintiff argues that Defendant's asserted legitimate, nondiscriminatory reason not to promote him because he had already served in the rotational position was never raised prior to the filing of this lawsuit, and therefore, is a newly conjured pretext for past discrimination. In support of this argument, Plaintiff points to certain of Mr. Self's responses to interrogatories propounded by the EEOC during the course of their investigation into Plaintiff's EEOC Charge. F. Exh. F-1. Specifically, Plaintiff argues that Mr. Self failed to expressly list this factor in response to an interrogatory regarding the selection process used to fill vacancies for the rotational TMC position in the fall of 2000. Id.

Upon further review of this document, however, the Court notes that, in response to a question regarding the reasons why Plaintiff was not chosen for the rotational position, Mr. Self responded that: "(2) Mr. McGregor **had served a previous rotation** as a Traffic Management

Coordinator" (emphasis added) Id. Therefore, despite Plaintiff's argument to the contrary, Mr. Self did mention prior to the filing of this lawsuit that Plaintiff's having already served in the rotational position was a factor he considered in making his recommendations.

Further, Mr. Self also listed job diversity as a factor in recommending an applicant for the rotational TMC position. Id. In his deposition testimony, Mr. Self stated that one of the purposes behind the rotational TMC position was to provide ATCS's with job diversity and that Plaintiff, because he had already served in the position, would not gain any more job diversity. Self Depo at 47. This fact, along with Defendant's actions in the fall of 2000 in recommending five applicants who had not previously served in the rotational position, is consistent with Defendant's stated position, from the outset, that Plaintiff was not chosen, in part, because he had already served in the rotational TMC position.

(b) Lack of Recommendations

As evidence that Defendant's argument that Plaintiff did not get the rotational TMC position because he had no recommendations is pretext for discrimination, Plaintiff points to several letters of recommendation and awards he received in the past. Relying on these he argues that it is inconsistent, and ultimately unbelievable, that, in light of these prior positive recommendations, he would not have received positive recommendations in support of his application for the rotational TMC position. P. Exh. tabs D, G, H. Further, Plaintiff relies on the fact that Joseph Hambrite and Leon Stinson, two of his former supervisors, told him that they gave him good recommendations to refute Defendant's allegations that no supervisor supported his application in the fall of 2000. Plaintiff's Brief at 7; P. Exh. tab C. Finally, Plaintiff has pointed to alleged inconsistencies in the testimony of three supervisors and urged that these inconsistencies create an inference of discriminatory intent

and ultimately cast doubt on the Mr. Self's recommendation not to promote Plaintiff. Plaintiff's Brief at 5-13.

Plaintiff, however, has failed to address the ultimate issue; namely, that one reason Defendant chose not to promote him was that he failed to secure support from any of his supervisors when he applied for the rotational position in the fall of 2000. D. SMF ¶ 22. That his supervisors might have said positive things in the past is not evidence that they recommended Plaintiff to Mr. Self in the fall of 2000 for the rotational TMC position and the successful applicants had such recommendations.

Further, even if the hearsay statements of Mr. Hambrite and Mr. Stinson, to the effect that they told Plaintiff that they gave him positive recommendations, could be considered by this Court (and, as hearsay, they may not), they would be insufficient evidence of pretext. To prove pretext, Plaintiff needed to show that some supervisor recommended him to the decisionmaker, Mr. Self, for a TMC position. Plaintiff has failed to produce such evidence.

Finally, Plaintiff points to inconsistencies in the testimony of three of his former supervisors, all of whom failed to recommend Plaintiff for a TMC position in the fall of 2000, in an attempt to "cause a jury to disbelieve each of the" supervisors. Plaintiff's Brief at 8. Specifically, Plaintiff argues that John Stephen Davis, a white, retired supervisor, Joseph Hambrite, an African-American supervisor, and Arthur Crook, a white supervisor, gave Plaintiff positive recommendations at one time, and therefore, it is inconsistent that they failed to recommend him in the fall of 2000[10]. Plaintiff's Brief at 8-10. Further, Plaintiff argues that there is no support in the record for these three supervisor's allegations that Plaintiff was not aggressive enough for the

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[10] Plaintiff does introduce evidence that Mr. Hambrite stated that he did not recall whether he gave Plaintiff a recommendation. Plaintiff's Brief at 10. Upon further review of his testimony, however, the Court notes that in response to a question regarding whether he recommended Plaintiff, Mr. Hambrite stated, "I don't think that I did, but I don't recall specifically." Deposition of Joseph Hambrite at 22. Regardless, Jr. Hambrite's testimony, viewed in the light most favorable to Plaintiff, only indicates that he is not sure if he recommended Plaintiff. As such, it does not contradict the Defendant's asserted legitimate non-discriminatory reason that it failed to promote Plaintiff, in part, because he lacked supervisory recommendations.

position, was tardy in the past, and had been found asleep on the job. Id.

This evidence, however, fails to show that one of these three supervisors recommended him in the fall of 2000. Instead, Plaintiff's evidence merely amounts to a showing that, at the most, the decisionmaker relied on inaccurate information or a misunderstanding when he failed to offer Plaintiff a TMC position based on the information he received (or failed to receive) from Plaintiff's supervisors. Even accepting Plaintiff's contention that his supervisors were mistaken about his ability to perform as a TMC, that does not establish pretext, for an employer may make employment decisions "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rehall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

Further, Plaintiff has failed to introduce evidence that Mr. Self, the decisionmaker, was aware of any of these

alleged inconsistencies in the recommendations given him by Mr. Davis, Mr. Hambrite and Mr. Crook. It is undisputed that Mr. Shelf relied on the recommendations given him by the TMU supervisors in making his recommendations for the rotational TMC positions. Self Depo at 37, 38; P. Exh. F-1. If some of these recommendations were based on erroneous facts, it is to no avail to Plaintiff because it does not evidence a proscribed motive; only, at the most, a mistaken reason for a decision.

Accordingly, the undersigned concludes that Plaintiff has not provided sufficient evidence to demonstrate pretext so as to raise a genuine issue for trial regarding Defendant's asserted legitimate, non discriminatory reasons for not promoting him to the position of rotational TMC.

ii. Pretext in the Selection of the Permanent TMC Position

Defendant's asserted legitimate, non-discriminatory reasons for not promoting Plaintiff to the permanent TMC

position are that he: (a) was not already employed in the TMU; (b) was not the most qualified applicant, and (c) was not recommended for the position[11]. Plaintiff argues that these reasons are a pretext for a discriminatory motive.

(a) Employment in the TMU

Plaintiff argues that Defendant's legitimate, non-discriminatory reason not to promote Plaintiff to the permanent TMC position because Plaintiff was not already employed in the TMU was subjective, unworthy of credence and thus pretextual.

Plaintiff, in an attempt to demonstrate pretext, points to the fact that Murray Perkins, a black female, had been employed in the TMU and she was not promoted to the permanent position. Plaintiff's Brief at 11. Citing Thompkins v. Morris Brown College, Plaintiff argues that the subjective application of an objective rule can demonstrate pretext. 752 F.2d 558, 564-65 n. 16 (11th Cir. 1985).

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[11] See footnote 6, supra and preceding discussion concluding that Plaintiff's failure to be recommended for a TMC position was a legitimate, non-discriminatory reason for Defendant's decision for which Plaintiff has failed to show pretext.

Appendix C
37.c.

Plaintiff, however, has mischaracterized the "objective rule" at issue. Despite Plaintiff's argument to the contrary, simply serving in a TMU position was not **the** basis by which applicants were afforded priority consideration for the permanent position. Rather, Mr. Self, in both his deposition testimony and "Responses to Interrogatories in the EEOC Complaint of Charles McGregor", stated that candidates currently serving in a rotational TMC position I.e. a TMU position **based upon** recommendations from their supervisors **as well as** their performance as a rotational TMC. D. SMF ¶ 19. And, in fact, serving in a rotational TMC position could not have been the sole basis for the decision as to which applicant to promote as there were at least three applicants for the permanent position who met this condition and only two open positions. Accordingly, Mr. Self, the decisionmaker, had to look, as he testifies he did, to other factors such as recommendations and performance.

Plaintiff, to show that the rule was applied subjectively, could have produced evidence that Ms. Perkins

had received recommendations from her supervisors and had performed well in her position as a rotational TMC but still did not get the position. Alternatively, Plaintiff could have shown that Mr. Hendricks and Mr. Puerifoy had not received recommendations from their supervisors and had not performed well in their rotational TMC positions but still were promoted. Plaintiff, however, has produced no such evidence.[12]

(b) Plaintiff's Qualifications

Plaintiff's final argument is that the Defendant's reason not to promote him to the permanent position because there were more qualified applicants is pretextual because Alton Self applied the applicants' work experience in a

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[12] Plaintiff has produced evidence in the form of an affidavit from Ms. Perkins that she had never received any negative recommendations while employed with the FAA and that Arthur Crook, one of the TMU supervisors, had done "everything that he could" in supporting her application. P. Exh. J. One recommendation, however, and the lack of any evidence regarding Ms. Perkins' performance as a rotational TMC, is not sufficient to show pretext in light of the number of recommendations and amount of support that Mr. Hendricks and Mr. Puerifoy, the two applicants selected for the permanent TMC position, received. D. SMF ¶ 32; D. Exh. tabs 8, 9, 15; Self Depo at 69-75.

subjective, inconsistent manner and deviated from normal policies and/or procedures in making his recommendations.

Plaintiff alleges that he has more total years of experience than either Mr. Hendricks or Mr. Puerifoy and had more temporary supervisory experience than either of the selectees. Plaintiff's Brief at 11-13.

There is no evidence, however, that the decision-maker factored in an applicant's total years of work experience in making any of his recommendations. Without such evidence, Plaintiff's work experience is irrelevant to show pretext. Further, Plaintiff attempts to draw a distinction by arguing that he has more **temporary supervisory** experience than either Mr. Hendricks or Mr.Puerifoy. Again, however, there is no evidence of how general temporary supervisory experience related to the job of either rotational or permanent TMC. Accordingly, there is no evidence that the Plaintiff's temporary supervisor experience was relevant to performing as a permanent TMC.

Plaintiff also alleges as evidence of pretext going to all three of Defendant's asserted legitimate, non-discriminatory reasons that Defendant, in choosing applicants for the permanent TMC position, deviated from "its own policies and/or practices as the selections related to" Plaintiff and Ms. Perkins. Plaintiff's Brief at 12. In support of this argument, Plaintiff has introduced evidence that the office of Civil Rights refused to sign off on the selection for the permanent positions and that Mr. Ian McMillian, a representative of the Office of Civil Rights, testified that, when these selections were made, the Defendant used an applicant's composite score to choose the most qualified applicant. Id. at 13. In light of this testimony, Plaintiff concludes that, because he had a higher composite score, he should have been selected over Mr. Puerifoy[13].

When asked how he knew that the Mr. Self should have used an applicant's composite score data to choose a

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[13] Plaintiff concedes that Mr.Hendricks, the other applicant selected for the permanent TMC position, had a higher composite score. Plaintiff's Brief at 12.

permanent TMC, Mr. McMillian stated, "Because I asked." McMillian Depo at 22. When counsel questioned Mr. McMillian as to whom he had asked, he replied, without identifying an individual, "[H]uman resources for air traffic." Id. at 23. This was the extent of Mr. McMillian's basis for understanding how applicants were chosen for the permanent TMC position. Based on this testimony, the undersigned cannot conclude that Mr. McMillian, a representative of the Office of Civil Rights with no apparent connection to the TMU, had the requisite personal knowledge to testify on the policies and/or practices of the TMU in selecting applicant's for the permanent TMC position. As such, his testimony must be dismissed as hearsay, if not double hearsay. See Rule 602 of the Federal Rules of Evidence ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter."); see also Macuba v. Deboer, 193 F.3d 1316, 1322, (11th Cir. 1999) ("The general rule is that inadmissible

hearsay 'cannot be considered on a motion for summary judgment.'").

Plaintiff has introduced no other evidence to support his argument that Mr. Self, by failing to rely solely on an applicant's composite data score, deviated from the policies and/or practices used to select a permanent TMC[14]. Therefore, Plaintiff's argument musts fail.

In summary, to meet his burden of establishing pretext, Plaintiff must do more than merely present some evidence of pretext. Rather, a Plaintiff must establish evidence that is sufficient, under Reeves, 530 U.S. at 149, and more than a scintilla, under Anderson, 477 U.S. at 242, to create a genuine issue of fact for trial that each of Defendant's asserted legitimate, non-discriminatory reasons

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[14] Defendant, on the other hand, has submitted the deposition testimony of Alton Self, the decision-maker who has personal knowledge of the selection process, who stated that the composite score, which goes to an applicant's experience level, was only used to determine whether an applicant met the minimum qualifications for the positions. Self Depo at 35, 36; Defendant's Reply Brief in Support of Motion for Summary Judgment at 12. Further, Mr. Self stated that every applicant for both the rotational and permanent positions met the minimum qualifications. Self Depo at 36.

for its decisions were pretextual. Plaintiff has failed to carry that burden as to any, much less all, of those reasons.

III. RECOMMENDATIONS

For all the above reasons, **IT IS RECOMMENDED** that Defendant's Motion for Summary Judgment (24) be **GRANTED** and that judgment be entered in favor of Defendant on all counts of Plaintiff's Complaint.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO RECOMMENDED this 30th day of April, 2003.

/s/

C. CHRISTOPER HAGY
UNITED STATES MAGISTRATE JUDGE